

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
BENCH AT AURANGABAD

CRIMINAL APPEAL NO. 609 OF 2012

Salim s/o Babuseth Tamboli,
Age 63years, Occ. Nil,
being convict No. 16446
detain in circle No.3,
Barrack No.1,
Yerwada Central Prison,
Pune 411 006

...Appellant

versus

The State of Maharashtra,
through the senior police Inspector
Shrirampur, City police station,
Shrirampur, Taluka Shrirampur
District Ahmednagar.

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Mrs. V.A. Shinde h/f Mr. Hemant Surve, advocate for the appellant
Ms. R.P. Gour, A.P.P. for the respondent-State.

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**CORAM : S. V. GANGAPURWALA AND
V. K. JADHAV, JJ.**

DATED : 17th DECEMBER, 2015

ORAL JUDGMENT (PER S. V. GANGAPURWALA, J.):

1. The present appellant alongwith one Sahida Salim was prosecuted for the offences punishable under Sections 302 and 306 of I.P.C. Accused No. 1 Sahida Salim Tamboli is acquitted of both the offences. The present appellant-accused No. 2 is convicted for the offence punishable under Section 302 of I.P.C. and sentenced to suffer imprisonment for life and pay fine of Rs.5,000/-, i/d to suffer

S.I. for three months. The appellant is acquitted of the offence punishable under Section 306 r/w 34 of I.P.C.

2. P.W.7 lodged a complaint (Exh. 105) that her sister Jamila had agreed to purchase a flat from accused No. 2 and said Jamila had paid Rs.3,00,000/- to accused No. 2 for purchase of the said flat. She was asking accused No. 2 to either return the amount or to execute the sale deed. However, accused No. 2 was not executing the sale deed and was avoiding the same. Accused No. 2, though agreed to execute the sale deed, did not execute the same. On the contrary, he cut off the water and light connections, so also, was abusing and threatening deceased Jamila. Deceased Jamila had intimated this fact to him on telephone. On 11.10.2004, when water and light connections of deceased Jamila's flat were disconnected, she went to accused No. 2. At that time, accused No. 2 slapped the deceased and accused No. 1 abused her. Deceased Jamila, because of the acts of accused, was irritated and frustrated. On 16.10.2004, at about 10.30 to 10.45 in the night, he received a phone call from his other sister stating that Jamila has died. Thereupon, he came to Shrirampur, saw the dead body of Jamila and he came to know that deceased sister Jamila had consumed poison because of which, she died. From her nose, some substance was oozing. Deceased Jamila has committed suicide and the accused persons

have instigated in commission of suicide by deceased Jamila.

3. After the said complaint was filed, investigation was taken up and charge sheet was filed for the offences punishable under Sections 302 and 306 of IPC, wherein, the present appellant is convicted for the offence punishable under Section 302 and acquitted of the offence punishable under Section 306 of IPC. Accused No. 1 Sahida Salim is acquitted of both the offences.

4. The prosecution has, in all, examined 13 witnesses.

5. Mrs. Shinde, learned counsel for the appellant submits that the case is based on circumstantial evidence. The initial complaint is filed alleging that the accused have abetted commission of suicide by deceased Jamila. Investigation also proceeded on the same line. However, subsequently, on the basis of supplementary statement, offence punishable under Section 302 is also registered. The learned counsel submits that the Sessions Court has convicted the present appellant solely on the ground of his conduct. According to the learned counsel, conduct alone would not be sufficient to convict the accused. Only because the accused was not arrested, that would not be a circumstance against the present accused. Learned counsel submits that the prosecution has to stand or fall on their own

feet and cannot derive any strength from the weakness of defence. Learned counsel relies on the judgment of this court in the case of **Ramnath s/o. Parshuram Sonboir vs. State of Maharashtra** reported in **2005 All MR (Cri) 1742**. According to the learned counsel, only because the accused did not surrender or was not traceable for some period, the prosecution cannot get benefit from this circumstance. The learned counsel relies on the judgment of the Apex Court in the case of **Datar Singh vs. The State of Punjab**, reported in **AIR 1974 SC 1193**. According to the learned counsel, bail applications were pending. The learned counsel further submits that even under Section 313 of Code of Criminal Procedure, no question was put to the accused of not being traceable for some period. In light of the fact that no question being put to the accused in this regard, the accused is not required to explain the same. According to the learned counsel, when the case is based on circumstantial evidence, the chain of circumstances is required to be so complete that there is no room for any other hypothesis except the guilt of the accused. The learned counsel relies on the judgment of the Apex Court in the case of **Harijan Megha Jesha vs. State of Gujarat**, reported in **AIR 1979 SC 1566(1)**. According to the learned counsel, the evidence on record does not suggest even homicidal death of the deceased.

6. According to the learned counsel, body of the deceased was found on 16.10.2004. The postmortem report shows that death of victim is prior to 2/3 days. Postmortem is conducted on 17.10.2004. There is no evidence that anybody has seen the accused entering the flat of the deceased at any point of time. The evidence of P.W.2 and P.W.7 is about the abuses and threat being given by the accused and no further. The learned counsel submits that the P.W.5 Doctor could not even state whether the death was suicidal, homicidal, natural or accidental. No opinion could be given. The cause of death is said to be anorexia that is lack of oxygen. The Doctor has opined that there are various reasons of anorexia, such as heart attack, asthma attack, emphysema. It is also stated by the Doctor that as the body was in decomposed condition, she could not come to a conclusion about the extent of anorexia in the said case. According to the learned counsel, when it is not proved that the death is homicidal or suicidal, then by no stretch, offence under Section 302 or 306 could be made out. According to the learned counsel, even the report of viscera shows that no poison was present. As such, poisoning is also ruled out. The complaint was filed on the basis that the deceased has committed suicide by consuming poison. P.W.9, who is the owner a shop nearby, had suggested that he had seen the deceased on 14.10.2004 and 15.10.2004. In the postmortem report, it is stated that death has taken place 2/3 days

prior to postmortem. He also states that he has seen accused No. 2 on 14.10.2004 and 15.10.2004. The said evidence is contrary to the evidence of P.W.6 who had stated that accused No. 2, on first day of Roza, which was 14.10.2004, had gone to Pune and that precisely proved the case of defence also. The learned counsel submits that the accusation is that somebody entered the flat of deceased by removing grill of the window and has tied hands of deceased and strangled her. The said case also falls to the ground. The Doctor has categorically stated that it cannot be said as to whether the injuries were ante-mortem or post-mortem. According to the learned counsel, investigation in other direction was never made. It has come in the panchnama that the clothes in other rooms were scattered and no inquiry was ever made with regard to the cash and gold. According to learned counsel, only on hypothetical assumption, that except accused No. 2, nobody could have entered the room and that accused No. 2 was not traceable for more than a year, and that there was a dispute with regard to the sale of flat, the Sessions Judge has convicted accused No.2. Apart from that, there is absolutely nothing to implicate the accused.

7. The learned counsel submits that it is only on surmises and conjectures, the conviction has been awarded to the present appellant. The same deserves to be set aside.

8. Miss Gour, learned APP submits that, no doubt, the case is based on circumstantial evidence, however, the chain of circumstances is complete. The motive is established. There was a quarrel and dispute between the deceased and the accused. Even on 11.10.2004, a complaint was lodged by the deceased about the threat given by the accused. The motive is well established. The conduct of the accused also would play a pivotal role. There was no reason for the accused to abscond for a period of two years. The said conduct is relevant. The accused could not prove his plea of alibi that he was at Pune at the relevant time. No evidence is led by the accused in that regard. According to the learned APP, ocular evidence will prevail over the evidence of P.W.5 Doctor. The witnesses who had seen the body, had observed injuries on the body of the deceased. This aspect also requires to be considered and the same has been rightly considered. The learned APP submits that the building was owned by accused No. 2. Except accused No. 2, nobody could have entered in the said flat. This fact is also rightly considered. The Sessions Judge has rightly considered the motive. Presence of accused No. 2 at Shrirampur at the time of incident is also established by evidence of P.W.9, so also, the presence of victim Jamila at Shrirampur at the time of incident is established. It is also established that it is a case of homicidal death. Conduct of the accused prior to the incident and after the incident leads to the guilt

of the accused. False and vague answers are given by accused No.2 in his statement under Section 313 of the Code of Criminal Procedure. According to the learned APP, injuries mentioned in the inquest panchnama and postmortem report show that by tying hands of Jamila, her mouth was pressed and therefore, her death is caused.

9. We have considered the submissions canvassed by the learned counsel for the respective parties, so also, have gone through the evidence on record. The case is totally based on circumstantial evidence. The case is also not based on last seen theory. Dealing with the case of circumstantial evidence, the Court has to be circumspect. The chain of circumstances has to be proved as would fasten the guilt of accused thereby leaving no room of doubt. Even a single chain missing would be fatal to the prosecution case.

10. The cause of death is said to be anorexia. The postmortem report also states the cause of death as due to anorexia. P.W.5- doctor, who has done the postmortem, very candidly states that the death of Jamila might be natural death or accidental also. The doctor is not in a position to also opine as to whether it is a homicidal death or a suicidal death. On the contrary, the Doctor has gone a step

further and has also admitted that the death of Jamila might be natural or accidental. The doctor has clarified that there are various reasons of anorexia. The same may be due to heart attack, attack of asthma or emphysema. There is no eye witness to the incident. The time and date of incident is also not coming forth. The body of deceased was found in the flat on 16.10.2004. As per the postmortem report, death of Jamila is prior to 2/3 days. The body was in total decomposed state. Only because there was dispute between the accused and the deceased over the sale of flat, one track investigation appears to have been undertaken.

11. No Muddemal is recovered except saree of accused No. 1, petticoat of the deceased and the pillow covers. It is nobody's case that the hands of deceased were tied with rope. However, the learned Sessions Judge has observed that accused No. 2 has also taken away the rope with him. The said observation appears to be perverse and without any evidence on record. No poison is found in the viscera as was case initially made out in the complaint. Only because there was dispute with regard to the sale of flat between the accused and the deceased and that there were chapter cases filed against each other, it appears that the accused has been roped in.

12. Even the presence of accused on 14th and 15th October, 2004,

in the said city is not proved. Though P.W.9 states that he had seen the deceased and accused on 14.10.2004 and 15.10.2004 in the said area, the same is contradicted by P.W.6 who used to fetch water for the deceased. She categorically states that accused was at Pune at the said time of incident i.e. on the first day of Roza, he was at Pune. The learned APP also, on instructions, states that 14th October, 2004 was the first day of Roza. There is absolutely no circumstance to even remotely suggest that the accused was present at the place where Jamila died at the relevant time. Except the factum of dispute between the accused and deceased over the sale of flat, there is no other evidence to lead us to the guilt of the accused. The conduct of accused after the incident need not be of any relevance, for the reason, no question under Section 313 of Cr.P.C. has been put to the accused in this regard. Reference can be had to the judgment of this Court in the case of **Sagar s/o Shrawan Bhosale vs. The State of Maharashtra** bearing **Criminal Appeal No. 446/2011**, wherein, it is held that merely because the accused had absconded cannot be used as a circumstance to draw an inference about the guilt of accused. Abscondence, by itself, is incapable of suggesting guilt of the accused. Coupled with the same, even no question is put to the accused under Section 313 of Cr.P.C. about accused absconding. Accused No. 2 had filed various applications in the years 2004, 2005 and 2006, seeking anticipatory bail. Though the same were rejected,

however, it shows that the accused was prosecuting his applications before the court.

13. The prosecution has miserably failed to prove that it is a case of homicidal death. The Sessions Judge has observed that in the flat of Jamila in Tamboli Complex, where she died, entry of other person except accused No. 2, was not possible. The said observation appears to be without any substance. In the said complex, there were other persons residing. There was even a Mangal karyalaya. The same is referred to in the spot panchnama. Only because the deceased was informing P.W.2 and P.W.7 her brothers about the trouble caused to her by the accused, the learned Sessions Judge has presumed that accused No. 2 has killed Jamila by entering in her flat by removing grills of the window and by pressing her mouth, nose and throat with the help of a pillow, by tying her hands. These observations are beyond the record and evidence. Even the prosecution has not come forward with this case, nor any of the witnesses have stated about this fact or the manner of incident. The said observations are totally the outcome of the imagination of the learned Judge. The Sessions Judge has observed that false and vague answers are given by accused No. 2 in his statements under Section 313 of Cr.P.C. What are those vague and false answers given by accused No. 2 in his statement under Section 313, are also

not spelt out in the judgment. The Sessions Judge has observed that accused Nos. 1 and 2 have mentioned that at the time of incident, they were at Pune, however, has not produced any documentary evidence on record to support his material contention. In fact, the said plea is substantiated by the evidence of Prosecution Witness No. 6, who has specifically stated that on the day of incident, accused was at Pune. The deceased died at the place where she was ordinarily residing. The prosecution has miserably failed to discharge this burden. The burden has never shifted upon the accused to explain, as required under Section 106 of the Evidence Act.

14. The Evidence of P.W.3 panch witness need not be of any relevance. Evidence of P.W.8 is only to the extent that the deceased had approached P.W.8, who was the President of Muslim Parishad, with regard to the dispute with the accused about sale of flat. P.W.10 is a Bank official. His evidence is only on the point that cheque was issued in favour of Tamboli Complex from the account of deceased.

15. There is absolutely no evidence to suggest that the accused/ appellant has caused death of Jamila. As stated above, the chain of circumstances is not complete. There is absolutely no evidence about accused causing homicidal death of Jamila.

16. In the result, the judgment dated 30.08.2012, passed by the Adhoc District Judge-1 and Additional Sessions Judge, Shrirampur, in Sessions Case No. 16 of 2005, thereby convicting the appellant-accused No.2 Salim Babuseth Tamboli for the offence punishable under Section 302 of Indian Penal Code, is quashed and set aside. The present appellant-accused No.2 Salim Babuseth Tamboli is acquitted of the offence punishable under Section 302 of Indian Penal Code in Sessions Case No. 16 of 2005. He be set at liberty forthwith, if not required in any other offence. The fine amount, if paid, be refunded to the appellant.

17. The Criminal Appeal is accordingly disposed of.

(V. K. JADHAV, J.)

(S. V. GANGAPURWALA, J.)

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